

1903 a suit of the nature referred to in section 283 of the Code of Civil
DEC. 4, 10. Procedure.

APPELLATE
CIVIL.

31 C. 511.

The Subordinate Judge has pointed out that in certain cases decided by the Allahabad, Madras and Bombay High Courts, a suit of this kind has been held to be one coming under Art. 17, Sch. II of the Court Fees Act and therefore subject to a Court-fee duty of Rs. 10 only. He has, however, followed two rulings of this Court, viz., *Ahmed Mirza Saheb v. Thomas* (1) and [515] *Modhusudhan Koer v. Rakhal Chunder Roy* (2), according to which a suit of this nature is one in which consequential relief is prayed for and therefore subject to an *ad valorem* Court-fee duty.

The learned pleader, who appears for the appellant, has invited us to come to the conclusion that the above cited rulings of this Court are erroneous and to refer the question of the Court-fee duty payable on such a suit to a Full Bench with the view of having the decisions in these two cases set aside. We do not see any necessity to adopt this course. The earlier of these two cases only followed the still older decision of *Mufti Jalaluddin Mahomed v. Shohorullah* (3); so that the rule of this Court on the subject is one of very many years' standing. Moreover, in this case the plaintiff seeks not only for a declaration of her right, but for the grant of a perpetual injunction restraining the sale, as the property of defendant No. 2, of the property she lays claim to. Hence, she would seem to us to seek for more than a mere declaratory decree and the suit comes within the purview of the Full Bench decision of the Allahabad High Court in *Ram Prasad v. Sukh Dai* (4), which seems to have been overlooked in some at least of the later cases decided by the Allahabad High Court, which are cited in the Subordinate Judge's judgment.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

31 C. 516.

[516] CIVIL RULE.

Before Mr. Justice Brett and Mr. Justice Mitra.

GAURI SHANKAR v. MAIDA KOER.*

[20th March, 1904.]

Award—Arbitration without intervention of Court—Application to file an award—Withdrawal of such application—Civil Procedure Code (Act XIV of 1882), ss. 373 and 525.

When an application has been made under s. 525 of the Civil Procedure Code, to have a certain award filed in Court, which had been made without the intervention of the Court, the applicant is at liberty at any stage of the hearing, prior to the delivery of judgment and preparation of the decree, to withdraw the application under s. 373 of the Code.

[Ref. 21 M. L. J. 404=8 I. C. 860=9 M. L. T. 160=(1911) 1 M. W. N. 33.]

RULE granted to the defendant, opposite party, *Mussamat Maida Koer.*

* Civil Rule No. 3551 of 1903.

(1) (1886) I. L. R. 13 Cal. 162.

R. 422.

(2) (1887) I. L. R. 15 Cal. 104.

(4) (1880) I. L. R. 2 All. 720.

(3) (1874) 15 B. L. R. Ap. 1; 22 W.

One Gauri Shankar made an application in the Court of the Subordinate Judge of Patna under section 525 of the Civil Procedure Code to have an award filed in Court, which had been made without the intervention of the Court. A notice was issued upon the opposite party Mussamat Maida Koer to show cause, why the award should not be filed. The application was numbered as a suit between the petitioner Gauri Shankar as plaintiff and the opposite party, Maida Koer, as defendant. Petition of objection having been filed by the opposite party, certain issues were framed, and evidence adduced by the parties was recorded by the Court. The pleader for the opposite party having finished his argument, the pleader for the petitioner in the midst of his argument put in a petition to withdraw the application, under section 525 of the Civil Procedure Code, without permission to bring a fresh suit. This application was opposed by the pleader for the opposite party on the ground that section 373 of the Civil Procedure Code did not apply to withdrawal of an application made under section 525 of the Code and as such the application [517] could not be withdrawn. The learned Subordinate Judge overruled the said objection and allowed the petitioner to withdraw his application. The opposite party then moved the High Court under section 622 of the Civil Procedure Code and obtained a Rule.

~~For~~ Babu Saligram Singh (with him Babu Kulwant Sahay) for the petitioner, contended that the Court had no jurisdiction to allow the petitioner to withdraw his application, inasmuch as section 373 of the Civil Procedure Code did not apply to applications made under section 525 of the Code.

Dr. Rash Behari Ghosh (with him Babu Umakali Mookerjee and Babu Raghunundan Persad) to show cause. The order under review was an appealable order, and therefore the application under section 622 of the Civil Procedure was wrongly made. See *Mahomed Wahiduddin v. Hakimian* (1), *Sreeram Chowdhry v. Denobundhoo Chowdhry* (2). The application was numbered as a suit between the petitioner as plaintiff and the opposite party as defendant; that being so, section 373 of the Civil Procedure Code applied to the case. A plaintiff is at liberty at any moment from the time of instituting his suit, until that of the decree being made, to withdraw the suit. See *Ram Churn Bysack v. Mrs. Ripsimah Harmi* (3).

Babu Saligram Singh in reply.

BRETT AND MITRA, JJ. It appears that the opposite party in this Rule made an application under section 525 of the Code of Civil Procedure in the Court of the Subordinate Judge of Patna to have a certain award, which had been made without the intervention of the Court on the 21st November 1902, filed in Court. The present petitioner objected. Issues were framed, evidence on both sides was gone into, and finally, when the case was being argued, the opposite party applied under section 373 of the Code of Civil Procedure to withdraw the application without permission to make a fresh one. The Subordinate Judge allowed the application, under the 2nd paragraph of section 373 of the Code, and [518] directed that the suit might be withdrawn, without permission to bring a fresh suit.

The petitioner afterwards applied to this Court and obtained a Rule in the following terms on the opposite party, to shew cause why the

(1) (1898) I. L. R. 25 Cal. 757.

(3) (1868) 10 W. R. 373.

(2) (1881) 9 O. L. R. 147.

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order of the Subordinate Judge mentioned in the petition should not be set aside on the ground that he ought to have dismissed the application of the plaintiff, and not given him liberty to withdraw the application under section 373 of the Code of Civil Procedure.

We have heard the learned pleaders in support of the Rule and showing cause against it, and in our opinion the Rule should be discharged. Section 525 distinctly provides that an application under that section shall be numbered and registered as a suit between the applicant as plaintiff and the other party as defendant and that the further proceedings shall be as in a regular suit. Under these circumstances we think that there is no ground for the contention that section 373 of the Code does not apply to such an application, and as we hold that the provisions of section 373 apply, we are of opinion that the opposite party was at liberty at any stage of the hearing of the suit prior to the delivery of judgment and preparation of the decree to withdraw from the suit. The Subordinate Judge in his judgment has distinctly noted that the application is made under the 2nd clause of section 373 of the Code and that the plaintiff has been allowed to withdraw the suit without permission to bring a fresh suit, and under such circumstances we do not think that there is any ground whatever for the apprehension which the petitioner appears to entertain. At the same time we are unable to find any provision in the Code, which would empower us to direct the Subordinate Judge to dismiss the suit rather than pass the order which he has passed under section 373 permitting the plaintiff to withdraw the suit. Under these circumstances the Rule must be discharged.

The Rule is discharged with costs.

Rule discharged.

31 C. 519.

[519] APPEAL FROM ORIGINAL CIVIL.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice,
Mr. Justice Hill and Mr. Justice Stevens.*

ADMINISTRATOR-GENERAL OF BENGAL *v.* KRISTO KAMINI DASSEE.*
[11th March, 1904.]

Limitation Act (XV of 1877), art. 49, art. 115 and art. 12—Deposit—Loan—Debtor—Executor—Assets.

K, made over certain Government securities to I, to be kept by him in deposit and, if necessary, to be used by him for raising funds wherewith to pay the purchase money of a house, and I was to draw the interest accruing due on the securities from time to time and pay the same to K, and in case I had occasion to pledge or sell the securities he would redeem or replace the same on being required so to do by K.

Held (Hill, J. dissenting), the transaction amounted to a deposit and not a loan and art. 145 of the Limitation Act (XV of 1877) governed the case. Even if the transaction amounted to a loan, inasmuch as I was K's executor and acted as such, the equitable doctrine that a debtor-executor is accountable for the amount of his debt as assets in his hands, would apply and the plaintiff as administratrix of K having instituted the suit within two years of her appointment was not barred from demanding from the estate of I the debt (assuming it to be a debt), which he contracted with K.

Held per Hill, J., the transaction did not amount to a deposit. Either art. 49 or art. 115 or art. 120 of the Limitation Act (XV of 1877) would apply to the case.

* Appeal from Original Civil No. 83 of 1903, in suit No. 352 of 1898.